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No. 85-78

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

October Term, 1985

STATE OF ALASKA,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT IN REPLY

A. The Decision Below Is Of Great Importance To A Fundamental Right Of State Sovereignty In All States.

Respondents'[1] characterization of the decision below as "carefully limited" to the isolated issue of floatplane takeoffs and landings on Slopbucket Lake (Fed. Opp. at 9 n.8; BBNC Opp. at 4) completely disregards the significant departure made in that decision from established constitutional doctrine.

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[1] The federal respondents and respondent Bristol Bay Native Corporation (BBNC) each filed a brief in opposition to Alaska's petition in which essentially the same arguments were presented. The term "respondents" is used throughout this brief to refer to those collective arguments. Respondents' briefs are cited individually as "Fed. Opp." and "BBNC Opp."

and the nationwide effect on title navigability litigation that will result. Under well-established precedents of this Court, title navigability is a factual issue determined by the capability of the waterbody to be used for purposes of conducting transportation and commerce, regardless of the mode, manner, or extent of use. *United States v. Utah*, 283 U.S. 64, 76, 83 (1931); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926). The Ninth Circuit decision replaces that broad factual inquiry with a technical, restrictive, and incorrect legal analysis. According to the Ninth Circuit, it is not sufficient for states to prove that a river or lake is navigable. They must prove that the waterbody is a "highway," used by "primarily waterborne" modes of commerce, and that the vessels operate "from point to point" on the body of water.

If not corrected by this Court, the erroneous legal analysis used by the Ninth Circuit will result, as it did in this case, in the failure of courts to consider facts demonstrating actual use of a waterbody for public transportation or commerce simply because the mode of use differs from those appearing in previous title navigability decisions. In Alaska, the decision will totally exclude consideration of floatplane activities from any title navigability case, even though floatplanes are a vital component of Alaska's transportation system.

Because the decision below reflects a fundamental shift in title navigability jurisprudence, its effects will not be limited to Alaska. Throughout the history of title navigability litigation, the federal government has opposed sovereign claims of title navigability by proposing restrictive legal interpretations of the terms used in the federal test. *See, e.g., Utah v. United States*, 403 U.S. 9, 11 (1971) (phrase "highway of commerce"). Until this case, those federal efforts have failed. The decision below — with its summary dismissal of Alaska's title navigability claim — is likely to encourage renewed federal attempts to restrict sovereign claims of title navigability, with adverse consequences for title navigability litigation throughout the United States.

Respondents' characterization of the decision below as limited to floatplane takeoffs and landings on Slopbucket Lake is also inaccurate. The district court's ruling, affirmed by the court of appeals, was that floatplane activities are *legally irrelevant* to title navigability determinations. Pet. App. C-8. It was on the basis of that broad exclusionary ruling that the court denied Alaska's summary judgment motion and dismissed the case with prejudice, not on the basis of a "carefully limited" finding that Slopbucket Lake is nonnavigable.

Respondents' attempt to belittle the significance of this case is also contradicted by their claim that the case has potentially momentous consequences for land ownership and land management in Alaska. Fed. Opp. at 9 n.7; BBNC Opp. at 6-7. In the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101(a), Congress specifically found that Alaska's lands and waters have "*nationally significant* natural, scenic, historic, cultural, recreational, and wildlife values" that deserve long-term protection. (Emphasis added). The effect of the decision below on future federal attempts to convey the beds of Alaska's waterbodies into private ownership is a matter of national concern and justifies this Court's review.

B. Neither Federal Statutes Nor The Alaska Constitution Are Relevant To The Issue Of Title Navigability.

Respondents' suggestion that Alaska's title navigability claim may be rejected on the basis of provisions in the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 - 1628, and in the Alaska Constitution is without legal foundation. In addition, the premise underlying that suggestion — that these provisions provide an adequate alternative to title navigability findings — is both unproven and inaccurate. Respondents' irrelevant and unproven propositions should not influence the Courts' decision to review this case.

Respondents assert that the public easement and reconveyance provisions in ANCSA adequately protect public use of Alaska's lakes for transportation. Fed. Opp. at 9-10. Those provisions were enacted more than 13 years after Alaska's statehood, however, and are irrelevant to the issue of title navigability. *See United States v. Utah*, 283 U.S. at 88-89 (rejecting reliance upon post-statehood federal activities unrelated to the navigability of the waters). Furthermore, the ANCSA provisions apply only to the 44 million acres of federal land conveyed to Alaska Native corporations. Title navigability is a matter of public concern on all 375 million acres in Alaska, not just on lands conveyed under ANCSA.

Respondents' claim based upon ANCSA is also speculative and unfounded. Nothing in the record indicates that the public easement and reconveyance provisions of ANCSA accomplish the broad public protections that respondents are claiming.[2] Alaska's sovereign rights and responsibilities under the equal-footing doctrine of the United States Constitution cannot hinge upon the Secretary's administrative discretion in determining whether and where public easements should be reserved.

A similar analysis applies to respondents' suggestion that provisions in the Alaska Constitution negate the need for review of this case. Fed. Opp. at 9, n.9. Title navigability is strictly a matter of federal law. *United States v. Holt State Bank*, 270 U.S. at 55-56. Alaska's constitutional provisions are therefore irrelevant to the issues presented here.

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[2] Respondents do not cite a single occasion in which the lands beneath waters used as a floatplane base have been reconveyed to a municipality or to the state under § 14(c) of ANCSA, 43 U.S.C. § 1613(c). *See* Fed. Opp. at 10, n.10. Although two one-acre site easements were eventually reserved on the shores of Slopbucket Lake under § 17 (b) of ANCSA, 43 U.S.C. § 1616 (b), that did not occur until an adversely affected public user filed an administrative appeal protesting the government's failure to do so initially. *Appeal of Walt Hanni*, ANCAB VLS 80-13. Moreover, the banks and shores of countless other rivers and lakes have been conveyed to Alaska Native corporations without these reservations.

Moreover, respondents do not cite a single case from an Alaska state court holding that the Alaska Constitution provides an equivalent degree of public protection for Alaska's waterbodies as does a finding of title navigability. There is simply no guarantee that public use of Alaska's important rivers and lakes will be protected if the submerged lands are privately owned.

C. Respondents Rely Upon Inaccurate, Undocumented, and Irrelevant Facts To Support Their Self-Serving Policy Arguments.

Respondents repeat the undocumented and inaccurate claim, erroneously relied upon by the district court, that Alaska has over three million small, isolated lakes accessible by floatplanes which will be affected by the outcome of this case. Fed. Opp. at 9, n.7; BBNC Opp. at 6-7. The claim has no factual support, in the record or otherwise. The number, size, and location of lakes in Alaska accessible by floatplanes was not the subject of a factual hearing in this case, and this issue is irrelevant to a determination of the navigability of Slopbucket Lake. Respondents' untried, unproven, and irrelevant claim should not influence this Court's consideration of Alaska's petition.

Respondents hypothesize that a finding of title navigability in this case will necessarily result in title navigability findings for all other lakes in Alaska upon which a floatplane theoretically could land. Fed. Opp. at 9, n.7; BBNC Opp. at 7. However, whether the mere capability of a waterbody to be used for takeoffs and landings by floatplanes is sufficient to establish title navigability is not presented by the facts of this case. Respondents' hypothesis is also an incorrect statement of the law and ignores Alaska's legal position in this and other cases. Prophesies that a finding of navigability in one case will result in never-ending streams of navigability findings have been flatly rejected both by this Court and other federal courts applying the federal test of navigability to new facts. *See, e.g., The Montello,* 87 U.S. (20 Wall.) 430 (1874); *Puget Sound Power & Light Co. v. FERC,* 644 F.2d 785, 789 (9th Cir.), *cert. denied,* 454 U.S. 1053 (1981); *Appeal of Doyon,* 86 I.D. 692, 708 (ANCAB 1979).

Respondents imply that a ruling in favor of the State of Alaska could adversely affect private use and development of submerged lands lying within Native conveyance areas. Fed. Opp. at 9, n.7; BBNC Opp. at 7. Once again, respondents' argument is irrelevant to the issue in this case and lacks a factual foundation. Their theoretical concern also runs directly counter to this Court's well-considered determination that private ownership of the beds of public waterways constitutes an unacceptable interference with the sovereign powers of state government. *Barney v. Keokuk*, 94 U.S. 324, 337-38 (1876). Respondents' position emphasizes the need for review and reversal of the decision below.

Respondents suggest that the real issue in this litigation is ownership of mineral resources in the subsurface estate of Alaska's lakes, not public use and access. Fed. Opp. at 8-10; BBNC Opp. at 7-8. Both issues are involved. Sovereign ownership of the beds of navigable waters carries with it control over the waters above them. *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452 (1892). Accordingly, state ownership of whatever resources are or may someday be discovered in the beds of navigable waters in Alaska (the record is silent on the subject) ensures that development of those resources will be conducted consistent with the public rights in the waters above them. Under the equal footing doctrine of the United States Constitution, responsibility for balancing the competing public interests in use and development of Alaska's rivers and lakes is vested in the sovereign State of Alaska, subject only to the regulatory powers granted to the federal government. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845). Respondents' argument based upon state ownership of the resources in the beds of navigable waters in Alaska turns established constitutional doctrine on its head.

Respondents' claim that consideration of floatplane use in determining title navigability in Alaska would deny other states equal footing (Fed. Opp. at 7, n.5; BBNC Opp. at 8) is based upon a misunderstanding of the equal footing doctrine.

The equal footing doctrine is concerned with equal sovereign rights, not equal property rights. *United States v. Texas*, 339 U.S. 707, 716 (1950). The fact that the total number of acres of navigable waters may differ from state to state, based upon differences in geography and modes of transportation, has no bearing on the issue of equal sovereign rights under the equal footing doctrine. Obviously, the total acreage of navigable waters will differ substantially between a small coastal state like New Jersey, an arid western state like Arizona, and the dramatic expanses of Alaska. *See United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 405-06 (1940).[3]

D. All Issues Presented By Alaska's Petition Are Worthy Of Review.

Respondents simply ignore the paramount issue of the legal relevancy of floatplane use. They do so by incorrectly focusing their arguments on the important but nevertheless subsidary question of the sufficiency of the evidence of floatplane operations on Slopbucket Lake for a finding of title navigability. The relevancy issue, disregarded by respondents, deserves this Court's attention.

The second issue raised in Alaska's petition also deserves attention. It addresses the lower court's failure to provide Alaska an opportunity to present its case at trial. Petitioners attempt to dismiss this important issue with the simplistic assertion that all of Alaska's allegations concerning floatplane use were accepted by the lower courts as true and that, since the use of floatplanes in Alaska and on Slopbucket Lake is not disputed, no factual issues remain to be litigated in this case. Fed. Opp. at 11, n.12; BBNC Opp. at 9. The decisions of this Court cited in Alaska's petition, however, address situations in which summary judgment is inappropriate *despite the lack of disputed issues of material fact.* Alaska Pet. at 13. Respondents have not addressed the true nature of Alaska's objection.

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[3] Professor G. Graham Waite's article, *Pleasure Boating in a Federal Union*, 10 Buffalo L. Rev. 427, 433 (1961), contains an excellent analysis of the equal footing consequences of factual variations in title navigability decisions.

There are a substantial variety of settings and circumstances in which floatplanes are used in Alaska. Slopbucket Lake is just one example. Delivery of the U.S. mail, hunting and fishing expeditions, natural resource exploration and development, scientific research, commercial fishing, tourism, community services, search and rescue operations, fire fighting, mundane activities like grocery shopping and visiting relatives, and numerous other aspects of life throughout Alaska involve the regular operations of floatplanes on Alaska's rivers and lakes. Some of these activities were mentioned in the written material submitted to the district court. Many others were not. All of these activities, however, are directly and adversely affected by the lower court's decision. Regardless of whether the facts of this case are reasonably subject to dispute, it was reversible error for the district court to issue a decision of such magnitude without giving Alaska the opportunity to fully present those facts at trial. *See Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948).

Respondents cite Alaska's motion for summary judgment as evidence that Alaska agreed that this case involved no issues of material fact necessitating a trial. Fed. Opp. at 11. In Alaska's view, the facts submitted in support of summary judgment were clearly sufficient to support a finding that Slopbucket Lake is navigable. Alaska's exercise of its right to move for summary judgment on that issue, however, is not a substitute for its right to present witnesses on the far-ranging issues presented by the federal government's motion to ignore all evidence relating to floatplane use as legally irrelevant. A summary judgment motion is no substitute for a presentation of witnesses who completely understand and can fully explain the significant role that floatplanes have played in Alaska's past, how they are used in Alaska today, and their importance to Alaska's future.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, because the decision below is in direct conflict with prior decisions of this Court, petitioner respectfully suggests that summary reversal would be appropriate.

DATED this 22nd day of October, 1985.

Respectfully submitted,

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